

BUREAU OF LAW

MEMORANDUM

Corp. Tax Determinations
A-1
Gotham Broadcasting Corp.

TO: Commissioners Murphy, Palestin and Macduff
FROM: E. H. Best, Counsel
SUBJECT: **GOTHAM BROADCASTING CORPORATION**

**Franchise Tax - Article 9-A
Privilege years ended December 31, 1957
and December 31, 1958**

Taxpayer is a Delaware corporation qualified to do business in New York and owning and operating radio station **WINS**, with studios and offices in New York City and a transmitter in Lyndhurst, New Jersey. At issue is the allocation which the corporation made of the receipts factor in the business allocation formula on its franchise tax reports for 1957 and 1958. Instead of allocating its receipts 100% to New York, taxpayer used a percentage meant to represent only that proportion of its total listening audience which was located in this State. This percentage was based on periodic surveys prepared for it which purported to show the number of "radio families" listening to its programs at least once a week, tabulated by states and counties. The basis for such reduced allocation is the claim by the corporation that its services are not performed entirely in New York but are performed where the sponsor's message which it delivers reaches the listener, both inside and outside the state. In auditing and stating the franchise tax for the above periods the receipts factor was allocated 100% to New York.

Gotham has submitted a memorandum of law in which it contends that the business of radio broadcasting is an interstate commerce activity and that taxes on its receipts, therefore, must be apportioned to the volume of business done within the taxing state. However, as set forth in my memorandum of December 1, 1965 to Deputy Commissioner Doran, I am of the opinion that the cases cited by it in respect to violation of the commerce clause are not in point. In that memorandum, I pointed out that the vital distinction between a gross receipts tax and one based on net income in so far as the commerce clause is concerned has been repeatedly pointed out by the United States Supreme Court (see United States Glue Company v. Oak Creek, 247 U.S. 321 (1918)). Even under a privilege tax actually imposed upon gross receipts, where a company is engaged in a jurisdiction in both intrastate and interstate commerce, the Court of Appeals has held that interstate receipts may be taxed if fairly allocated

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to the activities carried on within the taxing jurisdiction (Matter of Federated Department Stores, Inc. v. Georgia, 307 U.S. 261 (1940); Matter of Gulf Oil Corp. v. Texas, 307 U.S. 342). Decisions such as Wells v. Wells, 305 U.S. 434 and Central Greyhound Lines v. Mealey, 357 U.S. 643 (construing the gross receipts tax imposed under Section 186-a of the Tax Law) indicate that the Supreme Court would also reach the same result with respect to a privilege tax actually imposed on gross receipts. There is, therefore, no constitutional objection based on a violation of the commerce clause to including 100% of the gross receipts in the receipts factor.

Gotham also relies on both Mass. Bond' Assn. Inc. v. North Carolina, 238 U.S. 123 and Phillips v. Tax Commission, 15 A.2d 143, 117 N.Y.2d 501. Both of these cases held that a method of apportionment which results in taxing a corporation out of all proportion to the amount of business done within the State will be set aside. However, the Supreme Court in Dallas Bros. v. McGolden, 315 U.S. 50, emphasized that one who attacks a formula apportionment carries the burden of showing by clear and cogent evidence that it results in taxing extrajurisdictional values.

Although Gotham can be distinguished in that, in that case, there was held to be no connection between the operation of an office building in Boston and a hotel in Buffalo to allow attribution of its capital gains in Massachusetts to the corporation's hotel activity in New York, radio broadcasting is a unitary business. The question as set forth in my memorandum to Mr. Moran is to arrive at a formula which would result in a fair and reasonable method of allocating receipts. The Board of Conference had originally proposed that a determination be prepared allocating the receipts from the servicing of radio time sales on the ratio of total compensation and wages of officers and employees within and without New York. I had originally proposed that a reasonable method would be to allocate on the basis of radio families by using the number of radio families located everywhere except New Jersey as the numerator of the allocation percentage to New York and the number of radio families everywhere as the denominator.

After a conference with the Corporation Tax Bureau, it was agreed that a fair allocation percentage would result if the receipts were to be allocated on the ratio of total dollar value of rents paid, real and personal property owned, and wages of employees within and without New York. I am, therefore, submitting the proposed determination incorporating this method of allocating receipts, the net effect of which is to effect a small reduction in the taxes as audited and stated.

[illegible]

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 1, 1861. It is a formal address, and it is the first of its kind since the signing of the Constitution. The President, James Buchanan, is addressing the Congress, and he is doing so in a very formal and dignified manner. He is discussing the state of the Union, and he is also discussing the issue of slavery. He is saying that the Union is in a state of crisis, and that the issue of slavery is the cause of this crisis. He is also saying that the President has a duty to maintain the Union, and that he is doing so to the best of his ability.

There is pending in the Corporation Tax Bureau another franchise tax matter that of Metromedia, Inc. presenting a similar situation which awaits the disposition to be made as the Gethum. If you agree with the proposed determination as prepared in this matter, kindly return the same together with the entire file to the Law Bureau for further processing and in order that a proposed determination may be prepared in the matter of Metromedia, Inc.

604221

MS:ca
Enc.

January 21, 1966

STATE OF NEW YORK

THE STATE TAX COMMISSION

In the Matter of the Applications

of

GOTHAM BROADCASTING CORPORATION

**For revision of franchise taxes
under Article 9A of the Tax Law for
the privilege years ended December
31, 1937 and December 31, 1938.**

**Gotham Broadcasting Corporation, the taxpayer
herein, having filed applications for revision of franchise
taxes under Article 9A of the Tax Law for the privilege
years ended December 31, 1937 and December 31, 1938, and a
hearing having been held in connection therewith at the
office of the State Tax Commission in New York City on
June 20, 1942, before William F. Sullivan, Senior Tax
Administrative Supervisor of the Corporation Tax Bureau of
the Department of Taxation and Finance, at which hearing
Anthony V. Scupies, treasurer of the taxpayer, appeared
personally and testified, together with Arnold E. Rosenwasser,
of Counsel, and the record having been duly examined and
considered by the State Tax Commission,**

It is hereby found:

**(1) That the taxpayer was incorporated under the
laws of Delaware on July 13, 1933; began business in New
York State on January 23, 1934 and is engaged in the busi-
ness of radio broadcasting;**

**(2) That on the basis of reports filed the tax
for the calendar year 1937 was recalculated and restated and**

tax for the calendar year 1958 was audited and stated, as follows:

Calendar Year 1957

Entire Net Income	\$ 18,894.43
Officers' Salaries (Less \$15,000)	158,247.62
Total	\$177,842.05
Business Allocation	84,919.37
New York Base	181,002.33
30% of above taxed at 5 1/2%	\$ 2,401.87

Calendar Year 1958

Entire Net Income	\$284,012.36
Business Allocation	88,093.53
New York Base	250,196.39
Tax at 5 1/2%	13,760.81
Plus Subsidiary Capital Tax	20.81
Total Tax	\$ 13,781.62

In computing the business allocation percentage, the receipts factor was allocated 100% to New York.

That the foregoing taxes were reaudited and restated and audited and stated on December 11, 1959, and applications for revision were filed on January 3, 1960;

(3) That the taxpayer operates radio station WINS from its principal office and studios in New York City where the broadcasting emanates; that the taxpayer maintains a transmitter site in Lyndhurst, New Jersey, for the transmitting of its programs;

(4) That Section 210.3 of Article 9A of the Tax Law reads, in part, as follows:

"The portion of the entire net income of a taxpayer to be allocated within the state shall be determined by

"(2) ascertaining the percentage which the receipts of the taxpayer, computed on the cash or accrual basis according to the method of accounting used in the computation of its entire net income, arising during each period from

"(C) services performed within the state, * * * ."

(5) That Article 413(3) of the 9-A Regulations reads, in part, as follows:

"Where a lump sum is received by the taxpayer in payment for services within and without New York, the amount attributable to services within New York is to be determined on the basis of the relative values of, or amounts of time spent in the performance of, such services within and without New York, or by some other reasonable method."

Upon the foregoing findings and upon all of the evidence presented, it is hereby

DETERMINED:

(A) That to give effect to the servicing of radio-time sales performed by the taxpayer within and without New York, the receipts from such sales are revised to an allocation on the ratio of total dollar value of rents paid, real and personal property owned, and wages of employees within and without New York;

(B) That the taxes for the privilege years ended December 31, 1957 and December 31, 1958 are resettled as follows:

December 31, 1957

Entire Net Income	\$ 18,894.43
Plus Officers' Salaries (Less \$15,000)	158,267.60
Third Minimum Base	\$177,842.03
Business allocation 77.45524%	
Allocated to New York	137,747.97
Taxable Base (30% of above)	41,324.39
Rate	5 1/2%
Tax	\$ 2,272.84

December 31, 1958

Entire Net Income	\$284,231.41
Business allocation 80.50911%	
Allocated to New York	228,832.18
Rate	5 1/2%
Tax	12,585.77
Plus Subsidiary Capital Tax	20.81
Total Tax	\$ 12,606.58

(C) That the recettied taxes do not include
taxes or other charges which are not legally due.

DATED: Albany, New York

this 1st day of March, 1966.

THE STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

~~COMMISSIONER~~

/s/

IRA J. PALESTIN

~~COMMISSIONER~~

/s/

JAMES R. MACDUFF

~~COMMISSIONER~~